

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PETER MacINERNEY, PhD,

Plaintiff,

-against-

5:21-CV-0818 (LEK/ML)

WILBER ALLEN,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

Plaintiff Peter MacInerney brings this pro se action against defendant Wilber Allen. Plaintiff commenced this action on July 16, 2021. See Dkt. No. 1 (“Complaint”). On the same day, Plaintiff filed an application to proceed in forma pauperis (“IFP Application”). See Dkt. No. 2.

On August 12, 2021, the Honorable Miroslav Lovric, United States Magistrate Judge, granted the IFP Application and recommended that Plaintiff’s Complaint be dismissed with leave to amend. See Dkt. No. 4 (“Report-Recommendation”) at 1. No objections to the Report-Recommendation have been filed in this case. See Docket.

For the reasons discussed below, the Court adopts the Report-Recommendation in its entirety, and Plaintiff will have thirty-days to file an amended complaint.

II. BACKGROUND

A. Factual History

Plaintiff’s factual allegations are detailed in Judge Lovric’s Report-Recommendation, familiarity with which is assumed. See R. & R. at 1–2.

III. LEGAL STANDARD

Within fourteen days after a party has been served with a copy of a magistrate judge's report-recommendation, the party "may serve and file specific, written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b); see also L.R. 72.1(c). A court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, if no objections are made, or if an objection is general, conclusory, perfunctory, or a mere reiteration of an argument made to the magistrate judge, a district court need review that aspect of a report-recommendation only for clear error. See *Barnes v. Prack*, No. 11-CV-857, 2013 WL 1121353, at *1 (N.D.N.Y. Mar. 18, 2013); see also *Demuth v. Cutting*, No. 18-CV-789, 2020 WL 950229, at *2 (N.D.N.Y. Feb. 27, 2020) (Kahn, J.). "[I]t is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not." *Zhao v. State Univ. of N.Y.*, 04-CV-0210, 2011 WL 3610717, at *1 (E.D.N.Y. Aug. 15, 2011) (internal quotation marks and citation omitted); see also *Hubbard v. Kelley*, 752 F. Supp. 2d 311, 312–13 (W.D.N.Y. 2009) ("In this circuit, it is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.") (internal quotation marks omitted). "A [district] judge . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." § 636(b).

IV. DISCUSSION

Plaintiff did not file objections to the Report-Recommendation. See Docket.

Consequently, the Court reviews the Report-Recommendation for clear error and finds none.

Therefore, the Court adopts the Report-Recommendation in its entirety, except that the Court will specify that Plaintiff has to file an amended complaint within thirty (30) days of this Order.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the Report-Recommendation (Dkt. No. 4) is **APPROVED and ADOPTED** in its entirety; and it is further

ORDERED, that the Court **DISMISS WITH LEAVE TO REPLEAD** Plaintiff's Complaint (Dkt. No. 1) for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B) and because the Court lacks subject matter jurisdiction; and it is further

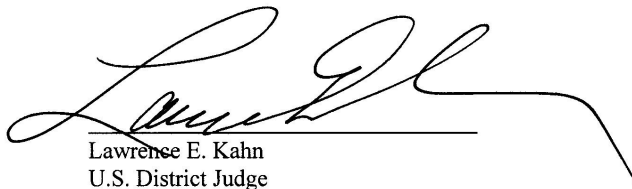
ORDERED, that upon the filing of an amended complaint as directed above, the Clerk shall return the file to the Court for further review; and it is further

ORDERED, that in the event Plaintiff fails to file an amended complaint **within thirty (30) days** of the filing date of this Order, the Clerk shall enter judgment dismissing this action due to Plaintiff's failure to comply with the terms of this Order, without further order of the Court; and it is further

ORDERED, that the Clerk of the Court shall serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: September 22, 2021
Albany, New York


Lawrence E. Kahn
U.S. District Judge